

policy of national, consistent oversight of wireless telecommunications. BAM agrees with SBMS that the Commission should determine that the particular practices identified by SBMS are reasonable under Section 201 of the Act.

As part of the Omnibus Budget Reconciliation Act of 1993, Congress amended the Communications Act to preempt expressly any action by a State to regulate the rates, even intrastate rates, of cellular service providers such as the defendant. Section 332(c)(3) provides, "[N]o State or local government shall have any authority to regulate the entry of or the rates charged by any commercial mobile service. . . ."

The Commission was given plenary authority to forbear from regulating CMRS providers such as BAM under the common carriage provisions of Title II of the Communications Act, and thereby to deregulate the rates and practices otherwise governed by the Act. Id., § 332(c)(1)(A). Thus, with respect to CMRS, it is the Commission, not states, that determines whether enforcement of any Title II provision is "necessary for the protection of consumers." Id. The Commission reviews local CMRS market conditions to determine whether greater regulation of CMRS providers is needed. Id., § 332(c)(1)(C). In short, Congress intended to and did consolidate regulation of CMRS rates in the Commission to ensure the uniform and rapid development of the industry.

Congress' intention to occupy the field of CMRS rate regulation is underscored by its reservation of authority to the Commission to address claims that CMRS providers have not met their fundamental obligation to provide rates,

terms and conditions of service that are "just and reasonable" under Section 201.²¹ As one court has observed: "Congress and the FCC have ensured that an elaborate federal regulatory framework remains available to protect consumers against unjust and unreasonable charges and practices by CMRS providers and a federal forum is available to all individuals asserting a violation of the Act."²²

The declaratory ruling SBMS requests is fully in line with Commission precedent as well as with the underlying policies of the Act. In 1994, seven states petitioned to retain various forms of rate regulation, pursuant to Section 332(c)(1)(B) of the Act.²³ The Commission found that none of the states proved that their respective CMRS market conditions failed to protect consumers adequately from unjust and unreasonable rates.

In reviewing the petition filed by the Connecticut Department of Public Utility Control (DPUC), the Commission addressed the practice of "rounding up" by cellular carriers, and found it to constitute a practice that was not unreason-

²¹Under Section 201(b), "[t]he FCC has broad authority to evaluate both prices and terms of proposed rates, it can investigate existing ones, and if necessary, prescribe alternative. Its supervisory powers extend to a carrier's charges, practices, classifications, and regulations." Total Telecommunications Services, Inc. v. AT&T, No. 95-2273, 1996 U.S. Dist. LEXIS 2995 at *11 (D.D.C. March 5, 1996) (internal quotation marks omitted); Southwestern Bell Telephone Co. v. Allnet Communications Services, Inc., 789 F.Supp. 302, 304-5 (E.D. Mo. 1992).

²²In Re Comcast Cellular Telecommunications Litigation, 949 F. Supp. 1193, 1198 (E.D. Pa. 1996).

²³See, e.g., Petition of the State of Ohio for Authority To Continue To Regulate Commercial Mobile Radio Services, Report and Order, 10 FCC Rcd 7842 (1995); Petition of New York State Public Service Commission To Extend Rate Regulation, Report and Order, 10 FCC Rcd 8187 (1995).

able, thereby establishing both that it (not the states) had the authority to regulate that practice, and that this practice was lawful.²⁴ The DPUC had sought to retain its regulatory regime of wholesale cellular carrier rate regulation based in part on what it believed was evidence of carriers' anticompetitive practices, including the rounding of per-minute charges. The carriers maintained that rounding up was the industry norm and constituted a reasonable practice. In denying the DPUC's petition, the Commission noted that the state agency had not approved rounding up, and recognized that both companies "apparently have the technical capability to bill at one-tenth second intervals." *Id.* at 7053. Nonetheless, the Commission held that "the practices the DPUC complains of do not violate any extant state or Federal regulation." *Id.* at 7058.

Nor can the preservation of existing common law and statutory remedies in section 414 of the Communications Act be read to undo the specific preemption effected by Congress in Section 332(c)(3) of the Act. Congress enacted the savings clause as part of the original legislation, almost 50 years before the enactment of cellular rate preemption in Section 332(c)(3)(A). The savings clause preserves only those "[s]tate-law remedies which do not interfere with the Federal Government's authority over interstate telephone charges or services, and which do not

²⁴Petition of the Connecticut Department Public Utility Control to Retain Regulatory Control of the Rates of Wholesale Cellular Service Providers in the State of Connecticut, Report and Order, 10 FCC Rcd 7025 (1995); aff'd, Connecticut Department of Public Utility Control v. FCC, 78 F.3d 842 (2d Cir. 1996).

otherwise conflict with an express provision of the [Communications] Act."²⁵ Here, Section 414 does not apply because plaintiffs' state law claims conflict with the express cellular rate regulations preemption clause in Section 332(c)(3)(A).

Plaintiffs' claims against SBMS (and BAM) necessarily require a judicial assessment of the reasonableness of the rates charged subscribers. Congress, however, has expressly and without qualification deprived the states of this adjudicatory authority. Thus, the savings clause does not save Plaintiffs' state law claims.²⁶

Similarly, the reference in Section 332(c)(3) to "terms and conditions of commercial mobile services" cannot be read to swallow the prohibition on state regulation of "rates charged" by such carriers. This principle was recognized by the California Public Utility Commission. The California legislature, in C.P.U. Code Section 2882.5, had sought "to create a billing standard for telephone corporations that accurately reflects actual usage by the consumer," and directed the state's Public Utility Commission (PUC) to investigate the advantages and disadvantages of requiring telephone corporations to bill in increments shorter than one minute and to file its findings and recommendations with the Legislature

²⁵MCI v. Graphnet, 881 F. Supp. 126, 131 (DNJ 1995); Cellular Dynamics, Inc. v. MCI Telecommunications Corp., 1995 U.S. Dist. LEXIS 4798 at *7 (N.D.-Ill. Apr. 12, 1995).

²⁶Courts have held that the savings clause does not permit class action plaintiffs to pursue claims of fraud or misrepresentation based on a cellular carrier's billing practices: "The savings clause cannot plausibly be read to preserve state law claims which directly conflict with the preemption of state regulation of CMRS rates envisioned by Section 332 of the Act." In Re Comcast Cellular Telecommunications Litigation, 949 F. Supp. 1193, 1205 (E.D. Pa. 1996).

by December 31, 1995. The PUC did so, and recommended against such a state-imposed requirement on wireless carriers on grounds of federal preemption:

Setting billing increments for wireless service may be tantamount to ratesetting since the increments in part determine the rate paid. . . . Federal law limits the Commission's role in the wireless telecommunications to consumer related issues of resolving billing disputes, allowing carriers maximum flexibility to respond to market conditions quickly and effectively. CMRS carriers probably cannot be mandated to bill in increments shorter than one minute by California statute.²⁷

Granting SBMS's request for a ruling that the practices at issue fall within
carriers' determinations of the "rates charged" under Section 332(c)(3) would be
consistent with other caselaw. For example, the Seventh Circuit addressed
similar issues involving the interpretation of the Cable Act. In Time Warner
Cable v. Doyle, 66 F.3d 867 (7th Cir. 1995), it upheld a cable rate regulation of the
Commission against a challenge based upon a state's consumer protection law.
Plaintiffs sought a court order requiring Time Warner to disgorge the income it
had earned through an alleged unfair trade practice, charging customers for "a la
carte" program channels. The Seventh Circuit held that Time Warner's "rate
structure is a federal matter and state consumer laws that impact upon it conflict
with the operation of the rate structure." The court also noted that the imposition
of a remedy which required disgorgement of the revenues earned under the
disputed billing practice would constitute preempted rate regulation by the state:

²⁷Compliance Report on Senate Bill No. 1998, Subminute Billing for Telecommunications Companies, California Public Utilities Commission, Dec. 29, 1995, at 30.

Were the State to order Time Warner to turn over all of its receipts from the sale of the a la carte service, Time Warner essentially would have been required to provide the service for free. However, as noted above, the Cable Act prohibits the State from regulating the rates Time Warner charged for this service.²⁸

Claims based on "rounding up" or billing until the "last hang-up" are tantamount to seeking a judicially-imposed reduction of rates, precisely what Section 332(c)(3) prevents. As the Supreme Court has stated, "regulation can be as effectively exerted through an award of damages as through some form of preventive relief."²⁹ One federal court has already addressed this very issue with regard to a cellular carrier, barring a class action claim based on rounding up:

[T]he claims alleged by the plaintiffs present a direct challenge to the way in which Comcast actually calculates the length of a cellular phone call and the rates which are charged for such a call. Thus any state regulation of these practices is explicitly preempted under the terms of the Act.³⁰

The Commission should incorporate the Comcast court's rationale into its policy, and preclude class actions from challenging rounding up and the other practices identified by SBMS.

²⁸Id., 66 F.3d at 881-82.

²⁹San Diego Bldg. Trades Council v. Garmon, 359 U.S. 236, 247 (1959).

³⁰Comcast Cellular Telecommunications Litigation, 979 F. Supp. 1193, 1201 (E.D. Pa. 1996).

CONCLUSION

For the reasons set forth in SBMS's Petition, and those set forth above, the Commission should assert its mandate to oversee the wireless industry, and a declaratory ruling is the proper vehicle to do so. The Commission should declare that courts may not consider damages claims which involve retroactive recalculation of charges or rebates to an entire base of subscribers, whatever the factual basis for the claim, because such damages would constitute preempted CMRS rate regulation. The Commission should also declare that courts may not impose service quality standards on carriers, or award damages to plaintiffs which are based on findings that a carrier's service did not meet a particular level of service quality.

Respectfully submitted,

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Dated: December 24, 1997

**SAMPLING OF CLASS ACTIONS
FILED AGAINST CELLULAR CARRIERS**

Case Name	Court	Claims
Bennett v. Alltel	U.S. District Court, Ala.	Rounding up.
Bootel v. MCI	Superior Court of the District of Columbia	Rounding up.
Brunson v. AT&T	United States District Court for the S.D. of Alabama	Rounding up.
Capital Holdings, Inc v. NYNEX Mobile	Supreme Court, New York County, NY	Dropped calls.
Caspar v. SWBMS	U.S. District Court, Boston, MA	Rounding up.
In re Celco Consumer Litigation	Superior Court of New Jersey Law Division: Camden County	Rounding up; SEND to END; Landline; Dropped calls.
Cohen v. AirTouch Cellular	California Superior Court, San Francisco County	Rounding up.
Day v. Sprint (v. AT&T)	U.S. District Court, N.D. California	Rounding up.
DeCastro v. AWACS	U.S. District Court, New Jersey	Rounding up.
Esquivel v. Southwestern Bell Mobile Systems	District Court, Starr County, Texas	
Griffin v. AirTouch Cellular of Georgia	Superior Court of Georgia, Fulton County	Rounding up.
Hagy v. 360 Communications Co.	Chancery Court for Washington County, Tennessee	Rounding up.
Halper v. Sprint	Circuit Court of Jackson County, Missouri at Kansas City	Rounding up.
Hardy v. Claircom	United States District Court, W.D. of Washington	Rounding up.
Haughton v. Sprint	Circuit Court of Pickens County, Alabama	Rounding up.

**SAMPLING OF CLASS ACTIONS
FILED AGAINST CELLULAR CARRIERS**

Case Name	Court	Claims
Kathuria v. Comcast	Middlesex County Superior Court, Law Division, New Jersey	Imposition of local/roaming charges not strictly according to geographical county boundaries.
Katona v. GTE Corp.	U.S. District Court Middle District of Florida, Tampa Division	Rounding up.
Kuhn v. Bell Atlantic	Superior Court, Camden County, N.J.	Rounding up.
Kuns v. 360 Communications Co.	Common Pleas Court of Erie County, Ohio	Rounding up.
Lair v. US West New Vector	King County Superior Court, WA	Rounding up.
Lair v. GTE Airfone	King County Superior Court Appealed to: Washington State Court of Appeals	Rounding up.
Landin v. Los Angeles Cellular Telephone Co.	Superior Court of the State of CA, County of Los Angeles	Rounding up.
Lee v. Contel Cellular of the South	Circuit Court of Mobile County, Alabama.	Rounding up.
Lee v. GTE Mobilnet (v. Contel Cellular of the South)	Filed: Circuit Court of Mobile County, Alabama Removed to: U.S. District Court, N.D. Alabama	Rounding up.
Mandell v. Bell Atlantic	Superior Court, Mecklenburg County, North Carolina	Rounding up.
Mann v. GTE Mobilnet (v. CellularOne)	Circuit Court for Jefferson County, Alabama	Rounding up.

**SAMPLING OF CLASS ACTIONS
FILED AGAINST CELLULAR CARRIERS**

Case Name	Court	Claims
Mobley v. AT&T	Circuit Court of Greene County, Alabama	Rounding up.
Moulton v. Alltel	Circuit Court of Montgomery County, Alabama	Rounding up.
Opalka v. AWACS	U.S. District Court, E.D. Pennsylvania	Rounding up.
Pennsylvania Bancshares v. AWACS	Montgomery County Court of Common Pleas, Pennsylvania	Rounding up; imposition of PIN requirement; alleged "poor" quality of cellular system.
Pepper v. Bell South	U.S. District Court, S.D. of Miss, Jackson Div.	Rounding up.
Ponder v. Contel Cellular of the South	U.S. District Court, S.D. Ala.	Increase of rates upon transfer of existing contracts to another provider.
Ponder v. GTE	Alabama State Court	Rounding up.
Ponder v. GTE Mobilnet	Alabama State Court U.S. District Court Southern District of Alabama, Southern Division	Termination of an "all-you-can-eat" type of plan allegedly a breach of contract and fraud.
Powers v. Air Touch Cellular	North County Branch of San Diego, State of CA	"Tear down" time -- similar to rounding up.
Rogers v. Westel	Indiana Superior Court, Marion County	Rounding up.
Roman v. Bell Atlantic NYNEX	Supreme Court of the State of N.Y.	Disclosure of landline fees.
Ross v. Pac Bell, ATT	Filed: California State Superior Court, County of San Francisco	Rounding up.
Ross v. Sprint	U.S. Dist. Ct., N.D. Calif.	Rounding up.

**SAMPLING OF CLASS ACTIONS
FILED AGAINST CELLULAR CARRIERS**

Case Name	Court	Claims
Saba v. AirTouch Cellular of Georgia	Superior Court of Georgia, Fulton County	
Sanderson v. AWACS	U.S. District Court, Delaware	Rounding up.
Sanderson v. AWACS	U.S. District Court, New Jersey	Rounding up.
Sirica v. Cellular One	Supreme Court, New York County, NY	Dropped calls.
Sharple v. AirTouch Cellular of Georgia	Superior Court of Georgia, Fulton County	Rounding up.
Smilow v. SWBMS	U.S. District Court, Boston	Rounding up.
Smith v. AirTouch Cellular of Georgia	Superior Court of Georgia, Fulton County	Rounding up.
Smith v. Sprint	U.S. District Court	Rounding up.
Tenore v. AT&T Wireless	Superior Court of Washington, King County	Rounding up.
Tolchin v. Bell Atlantic	Supreme Court of the State of NY, Kings County	Rounding up; SEND to END; landline; dropped calls.
Weinberg v. Sprint	Superior Court, Bergen County, N.J.	Rounding up.
Winston v. GTE Communications System, Corp.	District Court of Harris County, Texas	Rounding up.

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LARRY CARROLL,
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On Behalf of all others
Similarly Situated,
Plaintiff,
vs.
CELLCO PARTNERSHIP,
180 Washington Valley Road
Bedminster, N.J. 07921,
Defendant.

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION - CAMDEN COUNTY

DOCKET NO. _____

CLASS ACTION

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Hunton & William

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Entered. 12/18/96

CLASS ACTION COMPLAINT

Plaintiff Larry Carroll, by and through his attorneys,
hereby complains against defendant as follows:

PARTIES

1. Plaintiff Larry Carroll is a resident of the Commonwealth of Pennsylvania. During the Class Period (as defined herein), plaintiff purchased a cellular telephone and, in connection therewith, purchased cellular telephone services from "Bell Atlantic Mobile or Bell Atlantic Mobile of Northern Jersey, Inc.," and later, Bell Atlantic NYNEX Mobile, as described herein.

2. Defendant Cellco Partnership ("Cellco") is a partnership organized and existing under the laws of the State of

Delaware with its principal place of business at 180 Washington Valley Road, Bedminster, N.J. 07921. The partners of Cellco are entities affiliated with the Bell Atlantic Corporation, which has offices in Pennsylvania, and the NYNEX Corporation of New York. At relevant times, Cellco was in the business of marketing, through its dealer network, cellular telephone services pursuant to the fictitious name, Bell Atlantic NYNEX Mobile. In addition, Cellco is the successor-in-interest to all liabilities of each subsidiary, joint venture and/or operating division of the Bell Atlantic Corporation or the NYNEX Corporation which have previously utilized the trade names "Bell Atlantic Mobile" or "Bell Atlantic NYNEX Mobile" in connection with the sale, or offering for sale, of cellular telephone services.

3. Bell Atlantic Mobile ("BAM") and Bell Atlantic NYNEX Mobile ("BAN Mobile") are fictitious names by which Cellco and its predecessors-in-interest market or have marketed cellular telephone services to customers in a multi-state region including New Jersey and Pennsylvania. Among those predecessors-in-interest are Bell Atlantic Mobile and Bell Atlantic Mobile of Northern Jersey.

JURISDICTION AND VENUE

4. This Court has jurisdiction over this action, and venue is proper in this Court, because Cellco transacts business in Camden County, and maintains numerous places of business in Camden County.

CLASS ACTION ALLEGATIONS

5. Plaintiff brings this action on his own behalf and on behalf of a multistate class (the "Class") consisting of all persons who purchased BAN Mobile and/or BAM cellular telephone service since February 1, 1990 (the "Class Period"), and a subclass (the "Subclass") of those in the Class whose service agreements fully disclosed the "rounding-up" billing practice described herein. Excluded from the Class and subclass are defendant and members of the defendant's dealer network as well as its partners, their respective directors and officers, and members of the immediate families of those directors and officers. This definition of the Class is subject to modification upon completion of discovery with respect thereto.

6. This action is properly maintainable as a Class Action with respect to the Class because:

(a) The members of the Class are so numerous that joinder of all of them is impracticable. Plaintiff believes and therefore avers that there are at least ten thousand members of the Class, geographically dispersed throughout the United States, including thousands in the State of New Jersey alone.

(b) There are questions of fact and law common to members of the Class which predominate over any questions affecting only individual members. The common questions include, inter alia, the following:

(i) whether defendant or its predecessors misrepresented or caused the misrepresentation or omission of

facts regarding the cost of subscribing to BAN Mobile or BAM cellular telephone services sold to plaintiff and the other members of the Class, intending for plaintiff and the other members of the Class to rely thereon;

(ii) whether defendant or its predecessors misrepresented or caused the misrepresentation or omission of facts regarding the performance of cellular telephone services sold to plaintiff and the other members of the Class, intending for plaintiff and the other members of the Class to rely thereon;

(iii) whether the misrepresentations regarding the prices and performance of BAN Mobile or BAM cellular telephone services were material;

(iv) whether plaintiff and the other members of the Class reasonably relied, directly or indirectly, upon those misrepresentations to their detriment;

(v) whether defendant or its predecessors-in-interest breached the terms and conditions of their service agreements with plaintiff and the other members of the Class by failing to provide an appropriate level of service consistent with their representations and with the reasonable expectations of customers;

(vi) whether defendant or its predecessors have breached the terms and conditions of their service agreements with plaintiff and the other members of the Class by failing to detect and prevent cellular fraud consistent with the reasonable expectations of customers; and

(vii) whether plaintiff and the other members of the Class were damaged thereby and, if so, what measure of damages is proper.

7. The claims of plaintiff are typical of the claims of the other members of the Class. Plaintiff has no interests that are adverse or antagonistic to the interests of the other members of the Class.

8. The defenses to plaintiff's claims are typical of the defenses to the claims of the Class.

9. Plaintiff will fairly and adequately assert and protect the interests of the other members of the Class. Plaintiff is committed to prosecuting this Class Action and has retained competent counsel experienced in litigation of this nature.

10. Plaintiff envisions no difficulty in the management of this action as a Class Action and has no conflict of interest in the maintenance of the Class Action. For all of the foregoing reasons, a Class Action is appropriate and superior to the other available methods for the fair and efficient adjudication of this action.

FACTUAL BACKGROUND

11. BAN Mobile and its predecessor BAM are two of the nation's leading trade names of providers of cellular telephone services. In connection, therewith, BAN Mobile and BAM widely advertised and promoted the purported quality of such services and the purported economies of their various price plans.

12. Over the last several years, there has been a virtual explosion in the number of cellular telephone users, due in substantial part to the marketing practices of defendant and its predecessors-in-interest.

13. Despite the substantially increased revenues resulting from the tremendous increase in the number of cellular telephone users, defendant and its predecessors-in-interest failed to improve their facilities, or to acquire additional facilities, necessary to provide sufficient capacity to handle the large increase in the number of calls they must handle, and to maintain the level of service to which callers are accustomed.

14. In fact, BAN Mobile's (and BAM's) cellular telephone services have been plagued by problems that are not shared with fixed station telephones, including distortion, making voices sound muddled as if underwater or adding an echo effect to the voices, annoying background noises, loud static, and most significantly, poor transition from cell to cell, and interruption of signals as users move from place to place, resulting in frequent "drop-offs" or disconnects in communications.

15. Because of the frequent "drop-offs," or disconnects, in communications, plaintiff and the other members of the Class have been required to redial and reconnect many more telephone calls than would have been required if they were utilizing alternative telecommunications services. The increased number of redials and reconnects substantially has increased the

cost to plaintiff and the other members of the Class of utilizing BAN Mobile's (and BAM's) cellular telephone services generally and as compared with the cost of owning and operating fixed station telephones. These increased costs are further amplified by the billing practice of "rounding-up," whereby BAN Mobile and BAM have artificially overstated bills by rounding each fraction of a minute of usage up to a full minute for the purpose of billing, instead of utilizing the cumulative time of all calls made during a billing period. The increased costs are made even greater still by the billing practice of measuring the duration of the call until the last hang-up of either the land-based or cellular user despite the fact that the call has been disconnected before the last hang-up. These increased costs to plaintiff and the other members of the Class represent additional operating revenues and profits for defendant and its predecessors, particularly when generated as a result of the need to re-dial discontinued calls.

16. As Cellco and its predecessors acquired other entities which utilized contracts which failed to disclose the practice of "rounding-up," and billing of landline changes, Cellco and its predecessors nevertheless failed to issue notice to customers making them aware of these practices.

17. Further, defendant's and its predecessors' practices exacerbate problems in dialing from one area code to another within the same local calling area, and dialing

information operators, all of which add to the number of disconnects, necessitating added expense and/or inconvenience.

18. Plaintiff and the other members of the Class experienced one or more of these problems with BAN Mobile's and/or BAM's cellular telephone services at least once during the Class Period, caused in part by technological limitations inherent in BAN Mobile's and BAM's services and in part because of their aggressive marketing efforts, which have lured more customers than it can successfully handle. This has occurred in large measure because BAN Mobile and BAM have taken advantage of their ability to carry many more telephone conversations over a single channel than can efficiently be conducted, thereby allowing them to increase their capacity without expanding the technological capability of their existing systems accordingly.

19. By maximizing the number of telephone conversations carried over existing systems, Cellico and its predecessors have been able to substantially increase their operating revenues while maintaining or only slightly increasing their operating expenses, thereby substantially increasing operating income at the expense of plaintiff and the Class.

20. Plaintiff and the other members of the Class were, at the time of their purchases of BAN Mobile and BAM cellular telephone services, unaware of the nature and extent of the problems with such services. Rather, they were informed, directly and indirectly, through BAN Mobile's and BAM's advertising, marketing, promotional materials and otherwise, and

reasonably believed, that BAN Mobile and BAM cellular telephone services offered quality and uninterrupted connections compared to those offered by traditional land-based telephone systems, when in fact, they provided numerous disadvantages; including the inability to support many features of the prior generation phones, such as automatic dialing and redialing, as discussed infra at ¶ 34.

21. Defendant and its predecessors-in-interest failed to disclose the extent to which they had squeezed excessive signals per available channel, thus lowering the quality of each transmission thereupon and thereby increasing the profits per channel to themselves, to the detriment of plaintiff.

22. In connection with BAN Mobile's and BAM's marketing of cellular telephone services, BAN Mobile and BAM created various "annual price plans." By widely distributing sales literature and other promotional materials to potential customers through their dealer network, defendant and its predecessors were able to make it appear that the BAN Mobile and BAM cellular service annual price plans were lower in cost than in fact they were. Such materials concealed the fact that so-called "landline" charges of at least twelve cents per call would be added to every connection with a land-based call in addition to the charges for airtime.

23. Defendant and its predecessors-in-interest also failed to disclose the manner and extent to which the customers' usage was billed, including the effect of "rounding-up" to the

nearest minute for billing purposes on re-connects, and the fact that calls are measured until the last user hangs up the telephone regardless of when the call is actually disconnected.

24. Further, defendant failed to disclose the pricing arrangements which it and its predecessors made with cellular telephone dealers to enable such dealers to offer cellular telephones at apparently low sales prices, which "discounts" were recouped from BAN Mobile and BAM in the form of higher service fees, in exchange for securing captive customers to their cellular networks. In effect, then, advertised "discounts" were not true discounts at all.

25. Defendant and its predecessors participated in and substantially assisted the commission of the acts and practices of BAN Mobile and BAM and shared in their profits by, among other things, determining pricing and developmental policies, and providing advertising and promotional material for distribution to plaintiff and other members of the Class, which materials misrepresented the quality and features of BAN Mobile and BAM cellular telephone services and omitted to state material facts about the actual cost of such cellular telephone services as alleged herein.

26. In subscribing to the cellular telephone services provided by defendant and its predecessors-in-interest, plaintiff and the other members of the Class reasonably relied upon the misrepresentations of material fact and omissions of other material fact by defendant and its predecessors.

27. Defendant and its predecessors also have placed the burden of detection of cellular telephone theft upon consumers unreasonably. In recent years, the cellular telephone industry has been plagued by increasing amounts of "theft" of cellular telephone service, called "cloning." When a cellular telephone is cloned, the thief copies the telephone's electronic identification number ("EIN"), which is broadcast during the cellular telephone connection, for the unlawful purpose of making cellular telephone calls that are charged to another, the rightful owner of the EIN, without intending to pay for the cost of such calls.

28. The EIN identifies the cellular telephone, and consequently the user to whom it is registered, and the cost of all calls made with any phone broadcasting the same EIN are in turn charged to the registered user of that EIN.

29. Cellular telephone thieves typically make calls at odd hours or from locations that are a considerable distance from the local region of the rightful owner of the EIN. For these reasons, among others, cellular telephone theft is readily susceptible to detection and prevention much the same way as credit card theft is detected and prevented.

30. Defendant and its predecessors-in-interest at relevant times made no adequate effort to detect or prevent fraud by analyzing the timing of or location from which cellular telephone calls are made, on behalf of some or all customers,

despite the fact that such methods of analysis were available or reasonably could become available.

31. Rather, defendant requires plaintiff and members of the Class to use a personal identification number ("PIN"), typically consisting of a four-digit code that is transmitted after the telephone number is sent. The PIN is intended to prevent cellular telephone thieves from using an EIN to make unauthorized cellular telephone calls much the same way as a personal identification number is intended to prevent anyone who finds a lost bank card from operating an automatic teller machine.

32. However, the PIN regularly is ineffective as a means of preventing cellular telephone theft because PINs are not required by all local cellular telephone providers, thereby permitting cellular telephone thieves to use the stolen EINs in locations other than that of the authorized subscriber. The PIN is also ineffective as a means of preventing cellular telephone theft because cellular telephone thieves now possess the technology to capture the transmission of the PIN as well as the transmission of the EIN.

33. Despite the fact that the PIN is ineffective as a method of preventing cellular telephone theft, and despite the fact that other more useful methods of preventing cellular telephone theft exist, Cellico requires plaintiff and members of the Class to use a PIN whenever making a cellular telephone call,

effectively shifting the burden for the detection and prevention of cellular telephone theft from itself to their customers.

34. In addition, because plaintiff and members of the Class are required to dial and send their PINs whenever placing outgoing cellular telephone calls, dialing is significantly more burdensome than without the PINs and many features of the latest and more costly cellular telephones, such as automatic dialing or re-dialing, are rendered inoperable.

COUNT ONE

VIOLATION OF THE CONSUMER PROTECTION LAWS OF NEW JERSEY

35. Plaintiff incorporates by reference paragraphs 1 through 34 as if set forth herein at length.

36. The contracts into which plaintiff entered contain a clause purporting to select the law of New Jersey as the law governing disputes regarding the contract.

37. The services purchased by plaintiff and the other members of the Class constitute "merchandise" within the meaning of the New Jersey Consumer Fraud Act ("CFA"), N.J.S.A. § 56:8-1(c).

38. Defendant's acts and practices described above constitute unfair or deceptive acts or practices within the meaning of the New Jersey CFA, N.J.S.A. § 56:8-1 et seq., in the following respects:

a. Defendant and its predecessors misrepresented material facts regarding the features of BAN Mobile's and BAM's

cellular telephone services sold to plaintiff and other members of the Class, and regarding billing practices, including, inter alia, "rounding-up" practices, land-line charges, the practice of measuring call durations until the last hang-up, and hidden pricing arrangements and charges which rendered advertised "discounts" meaningless;

b. Defendant and its predecessors knowingly, recklessly, or negligently concealed the nature and extent of the problems with BAN Mobile's and BAM cellular telephone services from plaintiff and the other members of the Class;

c. Defendant and its predecessors misrepresented or implied that BAN Mobile and BAM cellular telephone services had certain technological and performance characteristics (such as clarity of sound reproduction) that they did not in fact have;

d. Plaintiff and the other members of the Class were reasonably induced to purchase services from defendant or its predecessors-in-interest based upon defendant's (or predecessors') misrepresentations and omissions;

e. Defendant's and its predecessors' misrepresentations and omissions of material facts regarding BAN Mobile's and BAM's cellular telephone services sold or leased to plaintiff and the other members of the Class constitute deceptive practices prohibited by rules and regulations of the Federal Trade Commission, 16 C.F.R. §§ 233 and 251. As such, defendant's acts and practices constitute per se violations of the New Jersey CFA;

f. Defendant's and its predecessors' acts and practices described above constitute unfair or deceptive acts or practices within the meaning of N.J.S.A. § 56:8-2, which prohibits "use or employment by any person of any. . . deception, fraud, false pretense, false promise, misrepresentation . . . or omission of any material fact with intent that others rely . . . in connection with the sale or advertisement of any merchandise [or services]";

g. Defendant's and its predecessors' acts and practices described above also constitute unfair and deceptive acts or practices within the meaning of N.J.S.A. § 56:8-2.2 prohibiting "advertisement of merchandise [including services] as part of a plan or scheme not to sell the same at the advertised price. . . ." in that defendant and its predecessors-in-interest, through BAN Mobile and BAM, lured plaintiff and members of the Class to purchase BAN Mobile or BAM cellular telephone services that did not offer the features or performance at the prices that were claimed;

h. Defendant's and its predecessors' acts and practices described above also constitute fraudulent conduct within the meaning of the New Jersey Consumer Fraud Act, in that they constitute "fraudulent conduct which creates a likelihood of confusion or misunderstanding," in that defendant and its predecessors-in-interest, through BAN Mobile and BAM, misrepresented material facts regarding comparative advantages of

BAN Mobile and BAM cellular telephone services over land-based telephones that did not exist in fact; and

i. Defendant's and its predecessors' acts and practices described above also constitute fraudulent conduct within the meaning of the New Jersey Consumer Fraud Act, in that they constitute the "making of false or misleading statements concerning the reasons for, existence of, or amounts of price reduction," in that defendant misrepresented material facts regarding the regular retail and sales prices for consumer merchandise sold to plaintiff and the other members of the Class.

39. As a result of defendant's and its predecessors' violations of the New Jersey Consumer Fraud Act and other substantially similar state consumer protection statutes, plaintiff and the other members of the Class, in reasonable reliance upon the broadly disseminated and common material misrepresentations of fact (and omissions of material fact with respect thereto) regarding the quality and characteristics of BAN Mobile and BAM cellular telephone services and pricing plans, purchased such services and did so at artificially inflated prices, and have thereby suffered ascertainable damages, the exact amount of which is presently unknown but which is capable of being liquidated.

40. As a further result of defendant's and its predecessors' violations of the New Jersey Consumer Fraud Act and other substantially similar state consumer protection statutes, and similar violations of its predecessors-in-interest, it is

liable to plaintiff and the other members of the Class for their costs of suit, including attorneys' and experts' fees, punitive damages, and such other additional relief as is necessary to remedy defendant's violations thereof.

COUNT TWO

COMMON LAW FRAUD

41. Plaintiff incorporates by reference paragraphs 1 through 34 as if set forth herein at length.

42. Defendant and its predecessors-in-interest intentionally misrepresented facts relating to the characteristics of BAN Mobile and BAM cellular telephone services sold to plaintiff and the other members of the Class, and defendant's practices regarding inter alia, "rounding-up," land-line charges, billing until the last hang-up, and hidden pricing arrangements, intending that plaintiff and the other members of the Class reasonably rely to their detriment thereon.

43. The facts misrepresented by defendant and its predecessors-in-interest were material.

44. Plaintiff and the other members of the Class, without knowledge of the truth regarding the operating characteristics of defendant's cellular telephone services and pricing plans sold by it or the other unscrupulous marketing and pricing practices engaged in by the defendant and its predecessors, relied upon defendant's and its predecessors' misrepresentations and unlawful practices, directly or indirectly, and purchased BAN Mobile's and BAM's cellular

telephone services from defendant or its predecessors, and did so at artificially inflated prices.

45. Because of defendant's superior knowledge, efforts to create a reputation for honesty, and position as a vendor of telecommunication services selling to the public, as well as the goodwill associated with the BAM and BAN Mobile brands, the reliance of plaintiff and the other Class members thereon was reasonable.

46. Plaintiff and the other members of the Class have thereby been damaged in an amount which is presently unknown but which is capable of being liquidated.

47. As a result of the fraudulent misconduct of defendant and its predecessors, defendant is liable to plaintiff and the other members of the Class for their actual damages, together with interest plus costs.

48. As a further result of the fraudulent misconduct of defendant and its predecessors, defendant is liable to plaintiff and the other members of the Class for punitive damages. Punitive damages are warranted because defendant's and its predecessors' actions described above were willful, wanton, and in conscious disregard for the rights of plaintiff and the other members of the Class.

COUNT THREE

COMMON LAW NEGLIGENT MISREPRESENTATION

49. Plaintiff incorporates by reference paragraphs 1 through 34 as if set forth herein at length.

50. Defendant and its predecessors-in-interest recklessly or negligently misrepresented facts relating to the characteristics and pricing plans of BAN Mobile's and BAM's cellular telephone services sold to plaintiff and the other members of the Class, and regarding inter alia, "rounding-up" billing practices and hidden pricing arrangements.

51. The facts misrepresented by defendant and its predecessors-in-interest were material.

52. Plaintiff and the other members of the Class, without knowledge of the truth regarding the operating characteristics and pricing plans of BAN Mobile and BAM cellular telephone services sold by defendant or the other unscrupulous marketing practices engaged in by BAN Mobile and BAM, relied upon misrepresentations and unlawful practices of defendant and its predecessors, directly or indirectly, and purchased such cellular telephone services from BAN Mobile and BAM, and did so at artificially inflated prices.

53. Because of defendant's superior knowledge, efforts to create a reputation for honesty, and position as vendors of telecommunications services and retailers selling to the public, as well as established goodwill of the trade names BAM and BAN Mobile, the reliance of plaintiff and the other Class members was reasonable.

54. Plaintiff and the other members of the Class have thereby been damaged in an amount which is presently unknown but which is capable of being liquidated.

55. As a result of defendant's negligent misconduct, by and through BAN Mobile and BAM, defendant and its predecessors are liable to plaintiff and the other members of the Class for their actual damages, together with interest plus costs.

PRAYER FOR RELIEF

WHEREFORE, plaintiff demands judgment against defendant as follows:

- a. certifying this action as a Class Action, with plaintiff and his counsel as the representatives of the Class;
- b. declaring that defendant's and defendant's predecessors' conduct was unlawful;
- c. awarding plaintiff and the other members of the Class damages in an amount necessary to compensate them fully for their losses, together with interest and costs;
- d. enjoining defendant from engaging in similar unlawful acts or practices in the future;
- e. awarding plaintiff and the other members of the Class statutory, treble, and punitive damages;
- f. awarding plaintiff and the other members of the Class injunctive relief providing for, inter alia, improvements in BAN Mobile's or BAM's delivery of cellular services, elimination of the PIN requirement, and rights to terminate existing BAN Mobile or BAM cellular telephone services which are the subject of this litigation without penalties;
- g. awarding plaintiff their costs of suit, including reasonable attorneys' and experts' fees; and

h. such other and further relief as is just and proper.

JURY TRIAL DEMAND

Plaintiff hereby demands a trial by jury of all issues so triable.

Dated: November 20, 1996

SHERMAN, SILVERSTEIN, KOHL,
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ATTORNEYS FOR PLAINTIFF
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CERTIFICATE OF SERVICE

I hereby certify that I have this 24th day of December, 1997, caused copies of the foregoing "Comments of Bell Atlantic Mobile, Inc." to be sent by first-class mail, postage prepaid, to the following:

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